IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1108 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHANDRAKANT MULJIBHAI PARIKH

Versus

STATE OF GUJARAT

Appearance:

MR HARIN P RAVAL for Petitioner

Mr. A.D. Oza, Government Pleader for Respondent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 27/02/2001

JUDGEMENT

Against the inaction of the Government of Gujarat in framing the Rules qua the pension for the Members of the Gujarat Legislative Assembly, petitioner the Ex-MLA by filing this petition under Article 226 of the Constitution of India, seeks appropriate writ directing the Government to frame the Rules, publish the same and decide his application in that regard passing appropriate order etc.

2. The matrix of the facts first be stated. The petitioner was elected as the Member of the Gujarat Legislative Assembly from Baroda City Constituency in the year 1967 and served as Member of the Assembly for the full term of 5 years. He was again elected when elections were held in 1972 and served as a Member of the Assembly for the full term of 5 years. The Gujarat Legislative Assembly passed an Act known as "The Gujarat Legislative Assembly Members Pension Act, 1984 (for short, "the Act"). It was to come into force on such day the Government of Gujarat might by notification in official gazette appoint. The State Government then decided to bring the Act into force in 1989. The assent of His Excellency, the Governor of Gujarat was obtained on 20th February 1986. The Government then decided to bring the Act into force from 15th August 1989. The Act was then published in the Government Extra-ordinary Gazette dated 8th August 1989, and the same has been brought into force from 15th August, 1989. As per Section 3 of the Act, the petitioner was entitled to the pension at the rate of Rs. 300/- per month and also the additional pension as per the Proviso to Section 3 of the Act. The petitioner then applied for the pension but his application is yet kept pending and no final order awarding the pension is passed on the ground that Rules which are required to be framed under Section 5 of the Act are not framed. The petitioner was disgustedly shocked knowing such fact that though the Act was passed in 1984 and was brought into force from August 15, 1989, the Rules under Section 5 were even not framed till 1992. By a letter dated 17th November 1990 he was informed that the question of payment of pension to the ex-MLAs was under active consideration. He could see that it was a trite-letter. Because of the inaction on the part of the Executive in framing the Rules the petitioner could see that the legal right to have the pension which he acquired under the Act was being impaired and denied. It was the bounden duty of the Executive to carry out the mandate of the Legislature and frame the Rules within reasonable time. It cannot put off the work of framing of the Rules to unreasonable length of time at its pleasure and sweet will or under any pretext. At present the petitioner is aged 65 years and if the Government is not framing the Rules and goes on delaying in the gruesome manner or shrewdly, at present it has been doing, he fears that he would not be able to get the pension during his lifetime. His legitimate right cannot be denied by the Government on the ground that the Rules are not framed. The Gujarat Ex-MLA Council has been formed by the former MLAs and several members of that

Council have also sending the applications prayed for the pension. The Government has no right to defeat the right the ex-MLAs have acquired under the Act to get the pension. Regardless of the framing of the Rules, he is entitled to pension as the requirements of Section 3 of the Act are satisfied in his case. The State Government has therefore no justifiable reason to deny the payment of pension on any ground or on the ground that the Rules are not framed. Despite considerable attempts when the Government has denied to make the payment of the pension, the petitioner is constrained to file this application for a direction to the Government of Gujarat to frame the Rules and publish the same under Section 5 of the Act, take just decision on his application for pension pending at present within the time granted and make the payment of the pension etc.

3. The learned advocate representing the petitioner submits that it is the right of the petitioner and several other MLAs to have the pension which they have acquired under Section 3 of the Act. That right to have the pension cannot be denied or jeopardised by the Government by avoiding to frame the Rules. It is the bounden duty of the Government to carry out the mandate of the Legislature and frame the Rules within reasonable time. If within reasonable time the Rules are not framed, this Court can issue the direction to the Government to frame the Rules within specified time. The right to pension granted by the Legislature enacting the Act may not be palatable to some section of the society or some persons because of a particular political philosophy or ideology they may have bred, but that cannot be a ground to mar the right granted. It is not that some thing strange or unusual has been done by the Legislature. Even the Members of the Parliament and Members of the Legislative Assemblies of different States in India get the pension under the different Acts passed by other State Legislatures or the Parliament. He then submitted what amount of pen==========

as under;

NO.	NAME	PENSION PER ADDITIONAL YEAR	MAXIMUM	OTHER FACILITY

1. Ex.Member Rs.500/-. Rs. 50/- ---- ----
of Legisla-
tors.

2. Andhra Rs.50/- per year whose Rs. 500/-p.m. ----
Pradesh income is not more than
6000 and served not less
than one year.

3. Arunachal Rs.300/- p.m. Rs. 50/- Rs. 500/-p.m.

Pradesh who has served for five
years.

4. Assam Rs. 4000/- p.m. Rs. 50/- p.m. Rs. 650/- p.m. ----

5. Bihar Rs. 1000/- p.m. Rs. 100/- p.m. Rs.2000/- p.m. family pension:- upt
Rs.1000/=
less than five years 75%, more than Rs.1000/- 50%
Rs. 300/- p.m. Rs. 50/-. minimum 750/- entitled travel
upto 15000 k.m.and 10000 k.m.
per year by the first class
railway coupon within and
outside the state respectively.

6. Goa Rs. 750/- p.m. Rs. 100/- Rs. 1500/- family pension :- same pension.

7. Gujarat Nil. Nil Nil Nil.

8. Haryana Rs.500/- p.m. Rs. 50/- ---- minimum of Rs. 600/- and

and his family.

free mpm-transferable pass travel
any public service vehicle inclu-
ding delux coach.

9. Himachal Rs.500/- Rs.100/- ---- family pension :-
Pradesh.
1. not exceeding Rs. 750/- 60%

of pension subject to a
minimum of Rs. 375/-.

2. exceeding Rs. 750/- but not

exceeding Rs.1500/- 40% of

pension subject to a minimum

of Rs. 450/- p.m.

3. exceeding Rs. 1500/-
30% of pension subject to a

or

maximum of Rs. 1250/-.

10. Jammu & Rs. 1000/- Rs. 100/- Rs.1200/- ----
Kashmir.

11. Karnataka Rs. 300/-(One Year) ---- ---- family pension Rs.200/-.

Rs. 500/-(Two Year)

Rs. 750/-(maximum for
three and above)

12. Kerala Rs. 300/- (for two years) Rs. 50/- ---- medical facility to himse
f.

13. Madhya (not available)
Pradesh

14. Manipur Rs. 750/- Rs. 50/- Rs.1500/- family pension Rs. 200/-.

15. Meghalaya Rs. 400/- Rs. 50/- Rs. 500/-
16. Mizoram Rs. 500/- Rs. 50/- Rs. 1000/- family pension :- same amount for
i i i remaining periods.
remaining periods.
remaining periods.
re
aining periods.

remaining periods.
remaining periods.
remaining periods.
remaining periods
r
maining periods.
remaining periods.
remaining periods.
for Rajasthan bus any time and

17. Nagaland Rs. 300/- Rs. 100/- Rs. 500/- ----

18. Orissa Rs. 500/- Rs. 40/- ---- family pension upto death for
w
ole life.

19. Punjab Rs. 500/- Rs. 100/- Rs.1000/- ----

20. Rajasthan Rs.500/- Rs. 100/- Rs.200/- family pension: same amount upto
and after ten death for whole life.
years Rs.50/-. Other facility :- Medical
t
eatment Rs. 1000/- per annum.
One free non-transferable pass
f
r Rajasthan b government hospital for himself

21. Sikkim Rs. 300/- Rs. 50/- Rs. 500/- ----

22. Tamil Nadu Rs. 300/- Rs. 50/- Rs. 600/- family allowance Rs. 250 p.m.
facility former member :-
1. medical help Rs. 500/-
2. Legislators hostel rate

Rs.5period of 5 days.

23. Tripura Rs.1000/- Rs. 50/- Rs.1200/- family pension Rs.500/-.
(for four years)

24. Uttar Rs.1250/- Rs. 100/- Rs.2050/- other facility :-
Pradesh free non-transferable bus pass
f
ee medical treatment in

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and dependent.

25. West Bengal Rs. 400/- Rs. 50/- Rs. 500/- ----

26. Delhi Rs. 200/- Rs. 50/- Rs. 500/- ----

27. Pondicherry Rs. 200/- Rs. 50/- Rs. 500/- ----

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It is further contended that large numbers of the ex-MLAs belong to middle class or the poor class and their right to have the pension when denied or marred by the Government on one or the another pretext, it is now the most ripe time for the Court to play the effective role exercising the powers under Article 226 of the Constitution. The Executive cannot be allowed to defy the legislative mandate by not framing the Rules and thereby frustrating the Act and right the MLAs have acquired.

4. Mr. A.D. Oza, the learned Government Pleader opposing the petition submits that the petitioner or other ex-MLAs have not acquired unfettered right to get the pension. The same is subject to framing of the Rules under Section 5 of the Act. The Legislature has not given the mandate to frame the Rules. By using the word "may" in Section 5, a discretion is given to the Executive to frame the Rules so as to carry out the object of the Act. When the word "may" is used, it is for the Executive to decide whether it is expedient to frame the Rules, and if so when and what type of Rules should be framed. The Court cannot direct the Executive to frame the Rules. He also draws my attention to the three decisions of the Supreme Court. In the case of M/s. Narinder Chand Hem Raj and others Vs. Lt. Governor, Administrator, Union Territory, H.P. & Others AIR 1971 SC 2399, what is made clear is that the power to impose the tax is a legislative power and the same can be exercised by the Legislature directly or by its delegate. No Court can issue a mandate to the Legislature or a subordinate legislative body to enact or not to enact a law which it was competent to enact. It was a case regarding levy of sales-tax under East Punjab General

Sales Tax. Touching the issue raised, it is held that there is no provision in the Act empowering the Government to exempt any assessee from payment of tax and therefore a right or direction cannot be issued under Article 226 to the appropriate authority to delete the entry of Indian Made Foreign Liquor and power from Schedule A and to include it in Schedule B to the Act. In short, what is made clear is that the Court cannot direct the Legislature or subordinate legislative body to enact a particular law or not to enact a particular law or delete a particular entry from a particular Act or Schedule to the Act because it is exclusively the legislative power and that can be exercised by the Legislature or as the case may be the subordinate legislative body. In another decision of Supreme Court Employees Welfare Association Vs.Union of India& Others AIR 1990 SC 334, it is made clear that the authority exercising the legislative function cannot be directed to do a particular act. Similarly, the President cannot be directed by the Court to grant approval to the proposals made by the Registrar General of the Supreme Court presumably on the direction of the Chief Justice of India. The third decision shown is in A.K. Rai Vs. Union of India AIR 1982 SC 710, wherein it is laid down that a mandamus cannot be issued to the Central Government compelling it to bring the provisions of Section 3 of the 44th Amendment Act into force. It is further held that the President of India cannot be compelled to grant the approval to the proposal of the Registrar General of the Supreme Court. It is also made clear that there cannot be a doubt that the authority exercising legislative function cannot be directed to do a particular act. This authority also therefore lays down that Court cannot direct the Legislature to show that the authority who has to legislate under delegation cannot be compelled to frame the rules or enact a particular legislation. The Court cannot embark upon the realm of the legislative function of the Legislature. The Legislature is free what law is to be enacted when and how and when the same should be brought into force and to what extent and relating to what area. The last decision shown to me is rendered in the case of State of Jammu & Kashmir Vs. A.R. Zakki and others - AIR 1992 S.C. 1546, which makes it clear that the writ of mandamus cannot be issued to the Legislature to enact a particular legislation. Same is also the case as regards the Executive when it exercises the power to make rules which are in the nature of subordinate legislation. Mr. Oza, the learned Government Pleader referring these three authorities emphatically submits that it would be beyond the competence of this Court to issue a writ of mandamus

and direct the Government to frame the rules under Section 5 of the Act because framing of the rules is in the nature of subordinate legislation, the task of which is assigned to the Executive. In other words, even if the Executive is assigned with framing of the rules, it is the legislative function under delegation and Court cannot direct the Executive when it cannot to the Legislature, to frame the rules.

5. Mr. Raval, the learned counsel for the petitioner at this stage in reply submits that legislations are of two types; one Conditional Legislation, and another Delegated Legislation. There is no restriction on the Legislature to delegate legislative power to the body or any person found fit in the matter. The delegate need not be one established by the Act. The power to make Delegated Legislation may either be mandatory or discretionary. If it is discretionary, the person or body to whom the power is delegated is nevertheless under a duty to exercise the discretion properly and promptly. In case of Conditional Legislation, no element of delegation of legislative power is there and therefore not open to attack on the ground of excessive delegation and the Court cannot issue any direction in that regard, while in Delegated Legislation, the Legislature does not confer legislative power on some outside authority and is therefore open to attack on the ground of excessive legislation and the Court is free to issue necessary direction. When the Legislature enacts the Act and authorises the Executive to bring the same into force in such area or at such time as it may decide, the same being Conditional Legislation and not the Delegated Legislation, it would be beyond the ken of the powers of the Court to direct the authority to bring the Act into force or decide the date for bringing the Act into force or apply the same to a particular area or not to a particular area, while in case of Delegated Legislation, if the delegate fails to carry out the duty and frustrate the object or improperly exercises the discretion conferred,the remedy by way of judicial review is certainly available, and the Court in that case can direct the delegate, may be the Executive, to frame the rules and esteem the mandate of the Legislature. In this case,the power to frame the rule is no doubt given to the Executive vide Section 5, but it is a Delegated Legislation and not a Conditional Legislation and therefore it would be open to the Court to issue the writ of mandamus directing the Government (Executive) to frame the rules.

6. Whether the Court can direct the Government, i.e. Executive to frame the Rules if the said function is

assigned by the Legislature to it (Executive) passing a particular Act is the point that arises for consideration. Under the Constitution, three organs of the Government, namely (1) Executive, (2) Legislature, and (3) Judiciary are formed vide Parts V & VI for the Union and the State respectively,wherein their working spheres are well defined. All the three organs of the Government have to function harmoniously without embarking upon the jurisdiction of the other organ. The elected representatives of the people forming the Legislature have to enact the laws for satisfying the will of the people and also for the well-being of the people. The Legislature is the sole Judge to decide which law or Act is necessary, and containing what provisions the Acts should be enacted, and whether a particular Act should in fact be framed or not, or whether the Act already framed and in force should be amended or deleted, or whether whole of the Act or part thereof should be made applicable to whole of the State or some areas because the same exclusively falls within its province. The Executive has to carry out the mandate of the Legislature expressed in the statutes or the Acts passed, and the Judiciary has to interprete the Act enacted by the Legislature and determine its virus and direct the Executive to do or not to do a particular act if it is not functioning in accordance with the Acts passed by the Legislature as well as examine the validity & legality of the orders passed by the Executive. The spheres of all the three organs of the Government are well defined and therefore as submitted by the learned Government Pleader, Mr. A.D. Oza, it would not be the function of the Judiciary to direct the Legislature what Act should be framed when & how or which Act in force should be deleted or amend the Act or bring the Act in force. If the Legislature has after framing the Act has assigned the rule-making function to the Executive, the Court cannot direct the Executive to frame the Rules because framing of the Rules is also a work of the Legislature. When that work of Legislation is entrusted to the Executive, the Executive becomes the agent of the Legislature or steps in the shoe of the Legislature. The Court cannot therefore ordinarily direct the agent to frame the Rules. The Supreme Court has, in the cases of M/s. Narinder Chand, Employees Welfare Association, and State of Jammu & Kashmir (Supra) also likewise made it clear that the Judiciary cannot direct the Legislature or the Executive if the Executive is assigned with the function to legislate to frame a particular Act or Rules but this is the general principle laid down. The Court cannot in all the cases sit on the fence cross-fingered and feeling helpless it cannot twiddle its thumbs, if the

purpose and object of the Act already passed and brought into force is being defeated or frustrated by the inaction on the part of the Executive to carry out the mandate of the Legislature because the will of the people expressed through the Act or Statute cannot be pooh-poohed and thereby the whole democratic structure cannot be allowed to be shattered and battered. It may be stated that if the Act is not at all enacted, or not brought into force after enacting the same, the Court cannot direct to enact the Act or bring the Act into force.

7. However the interference of the Court in legislative functions when would be within the constitutional powers or justified has to be elucidated. The Legislature cannot in any case confer its essential functions which have been entrusted to it by the Constitution, namely what the law should be, power to repeal the law or make it inoperative or power to modify the Act in its essential particulars. It cannot confer unguided & uncanalised powers for the application of the Act. A Legislature cannot however foresee and provide for all the future contingencies owing to the challenges of the complex socio-economic problems. The function of the State is to secure to its citizens, social, economical and political justice, preserve & protect fundamental rights and the unity of the nation and boost the directive principle. The desire to attain such objects of the Constitution has resulted in intense legislative activity touching every aspect of the life of the citizens and the nation. By the march of science in every field the task of legislation has increased in direct geometric progression. The Legislature is not the body of experts or specialists. It can function best when it is concerned with general principle, broad objectives and fundamental issues instead of technical & situational intricacies which are better left to well equipped full-time executive body and specialist public servants. The Legislature has neither the time nor expertise to be involved in details and it cannot visualise and provide for new, strange, unforeseen and unpredictable situation arising from complexities of modern life and ingenuity of the men. That is the raison d'etre for Delegated Legislation. It makes assignment of legislative function to an extent inevitable and indispensable. The plenary power to legislate carries with it the power to assign the said function to an outside authority may be Executive or others. After laying down the policy & principle, it can assign. Such assignment is of two types, namely (1) Conditional Legislation and (2) Delegated Legislation.

8. It may be stated, because of the rival contentions, what "Conditional Legislation" is and what the "Delegated Legislation", and the same should be distinctly understood. In case of Conditional Legislation, the aim of the Legislature is to project its mind as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of law. It is not however possible to provide subject for all cases and therefore Legislation, from the earliest time and particularly in modern times, has taken the form of Conditional Legislation leaving it to some specified authority to determine the circumstances in which the law shall be applied or to which its operation shall be extended or the particular class of persons or goods to which it shall be applied. A provision is therefore made in the Act conferring the power on an outside authority to bring into force at such time as it might in its own discretion determine is "Conditional" and not "Delegated Legislation" and will be valid unless there is in the constitutional Act any limitation on its power to enact such a Legislation. The Legislation may be `Conditional' on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to an external authority may be the Executive. An incomplete legislation, living on an external authority to enlarge the area within which a law actually in operation is to apply, is a "Conditional Legislation". Such Legislation comes under a separate category being different from the Delegated Legislation.

9. The power of delegation is a constituent element of the legislative power as a whole. As stated above, in modern times, the Legislature enacting several laws has to meet the challenges of complex socio-economic problem. For the said purpose, subsidiary or ancillary powers are required to be delegated for carrying out the policy & principles laid down in the Act. The Legislature, therefore, cannot delegate its essential legislative function in any case. It must lay down the legislative policy and principles and afford guidance for carrying out said policy before it delegates its subsidiary powers in that behalf. What is delegated is the task of subordinate legislation, which, by the very nature, is ancillary to the Statute which delegates the power to make it effective. So, under Delegated Legislation, the power to make the rules, regulations etc., is confirmed on the outside agency which may be the Executive and such rules and regulations must be in consonance with the policy and principles laid down in the Act or the

Statute. In other words, under "Delegated Legislation", the Legislature, within its province, leaves to the delegate to determine how the provisions of the Act can best be implemented and what major substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purpose of the Act.

10. The distinction between "Conditional Legislation" and "Delegated Legislation" is that in the former the delegate's power is that of determining when a Legislature declared rule of conduct shall become effective and the latter involves delegation of rules-making-power which constitutionally may be exercised by the administrative agent. This means that the Legislature, having laid down the broad principles of its policy in the legislation, can then leave the details to be supplied by the administrative authority. In other words, by "Delegated Legislation", the delegate completes the legislation by supplying details within the limits prescribed by the Act or Statute, and in the "Conditional Legislation" the power of legislation is exercised by the Legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend. Thus, when the delegate is given the power of making rules and regulations, in order, to fill in the details to carry out and subserve the purposes of the legislation, the manner in which the requirements of the Statute are to be met and the rights therein created to be enjoyed, it is an exercise of "Delegated Legislation". But when legislation is complete in itself and the Legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying into effect, it is "Conditional Legislation" and this is what is made clear by the Supreme Court in Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and another Vs. The Union of India (1960) 2 S.C.R 671 = AIR 1960 SC 554. In short, therefore, "in case of conditional legislation, the legislation is complete in itself but its operation is made to depend on fulfillment of certain conditions and what is delegated to an outside authority is the power to determine according to its own judgment whether or not those conditions are fulfilled; in case of delegated legislation proper some portion of legislative power of the Legislature is delegated to the outside authority may be the Executive in that the Legislature though competent to perform both the essential and ancillary legislature functions performs only the former and parts with the latter, i.e., the

ancillary function of laying down details in favour of another for executing the policy of the statute enacted; the distinction between the two exists in this that whereas conditional legislation contains no element of delegation of legislative power and is therefore not open to attack on the ground of excessive delegation, delegated legislation proper does confer some legislative power on some outside authority and is therefore open to attack on the ground of excessive delegation.

11. In the case on hand, the Legislature has delegated the function of framing of the Rules to the Government. The assignment therefore falls within the ambit of delegated legislation. When there is a delegation whether the Court can direct to frame the Rules is the question required to be examined. As discussed hereinabove, in case of a Conditional Delegation, the Court cannot direct the Government (Executive) to frame the Rules because that amounts to unjust & unauthorised interference in the sphere of the legislation but if there is a Delegated Legislation, it is open to the Court to direct the Government to frame the Rules. Of course, it would not be open to the Court to direct what type of Rules should be framed, but certainly the Court can direct to frame the Rules that may be deemed just & proper in the facts and circumstances and keeping in mind the object & purpose of the Act, as well as policy adopted and guidelines if given in the Act. Before I proceed, Sections 3, 4 & 5 of the Act may be quoted :

3. (1) With effect from the date of commencement of this Act, there shall be paid a pension of three hundred rupees per month to every person who has served as a member for a term of office of five years whether before or after such commencement and whether continuously or not :

Provided that, where any person has served as aforesaid for a period exceeding five years, there shall be paid to him an additional pension of sixty rupees per month for every year of such service in excess of five years so, however that in no case the pension payable to such person shall exceed six hundred rupees per month :

Provided further that where the Assembly is dissolved before the expiry of its duration of five years, a member of such Assembly shall, for the purposes of this sub-section, be deemed to have served as such member for a term of office of five years.

(2) In computing the number of years for the purposes of sub-section (1), the period during which a person has served as a Speaker of Assembly or, as Minister, Minister of State, Deputy Minister or Parliamentary Secretary or in more than one of those capacities by virtue of his membership of the Assembly, shall also be taken into account.

4. (1) Where any person entitled to pension under section 3,__

(a) is elected to the office of the President or Vice-President of India or is appointed to the office of the Governor of any State or the Administrator of any Union Territory; or

(b) becomes a member of the Council of State or the House of the People or any Legislative Assembly of a State or Union Territory or any Legislative Council of a State; or

(c) is employed on a salary under the Central Government or any State Government, or any corporation owned or controlled by the Central Government or any State Government, or any local authority or otherwise receives any remuneration from such Government, corporation or local authority;

such person shall not be entitled to any pension under section 3 for the period during which he continues to hold such office, or continues as such member, or is so employed, or continues to receive

such remuneration :

Provided that, where the salary payable to such person for holding such office or being such member or being so employed, or where the remuneration referred to in clause (c) paid to such person, is less than the pension payable to him under section 3, such person shall be entitled to receive only the balance as pension under that section.

(2) Where any person entitled to pension under section 3 also receives any pension other than pension as a freedom fighter from the Central Government, or any State Government, or any local authority under any law or otherwise, then,__

(i) where the amount of pension which he receives under such law or otherwise, is equal to or in excess of that to which he is entitled under section 3 such person shall not be entitled to any pension under that section; and

(ii) where the amount of pension which he receives under such law or otherwise is less than that to which he is entitled under section 3, such person shall be entitled to pension under that section only of an amount which falls short of the amount of pension to which he is otherwise entitled under that section.

5. (1) The State Government may make rules or orders for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules or orders may provide for any of the following matters, namely :-

(a) the form in which and the

authority to which an application for pension shall be made;

(b) the certificates to be furnished along with an application for pension;

(c) the declarations to be made at the time of drawing pension;

(d) any other matter which is to be, or may be, prescribed.

(3) Any rule or order made under this section may be made so as to be retrospective to any date not earlier than 17th March, 1962 the date on which the first Gujarat Legislative Assembly was constituted as a result of general elections.

(4) All rules or orders made under this section shall be laid for not less than thirty days before the State Legislature as soon as possible after they are made and shall be subject to rescission by the Legislature or to such modification as the Legislature may make during the session in which they are so laid or the session immediately following.

(5) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette, and shall thereupon take effect.

Section 5 of the Act, when read along with Section 3, it becomes clear that the assignment of the function of framing of the Rules is as stated above not the Conditional Delegation, but Delegation Proper because Section 3 providing the grant of the pension, does not lay down that subject to the Rules that may be framed by the Government (Executive) pension shall be paid. Section 3 makes it clear that even if the Rules are not framed, the pension has to be paid at the rate mentioned therein. In other words, the operation of Section 3 is not made subject to the Rules that may be framed by the Government. Even the Rules are not framed and the applications for getting the pension are received from the Ex-MLAs, the Government (Executive) has to consider

those applications keeping Section 3 in mind because vide Section 3, the Legislature has laid down the policy and principles indicating what should be paid and when the same is kept in abeyance. In view of the fact, the delegation in the case on hand cannot be said to be a `Conditional Delegation', but a `Delegated Legislation'. When that is so, it is open to the High Court to direct the Government to frame the Rules that may be found just, proper, adequate, and necessary. In the aforesaid decisions cited by the learned Government Pleader, what appears when the same are perused with finicky details is that in those cases there was `Conditional Delegation' and therefore the Apex Court held that the Court cannot direct the Government to frame the Rules under the Act already brought into force or under the provisions of the Constitution. When that is so, all the three decisions cannot be pressed into the services of the opponents. The contentions of the learned Government Pleader must, therefore, fail.

13. Of course the word "may" appears in Sec. 5; but it cannot be said as contended by learned Government Pleader that the Executive vested with the discretion is free to decide either way, as its discretionary powers are beyond any direction or judicial fiat. In the case of Hamdard Dawakhana (Supra), it is observed that the discretion should not be so wide that it is impossible to discern its limits. There must instead be definite boundaries within which the powers of the administrative authority are exercisable. Delegation should not be so indefinite as to amount to and abdication of the legislative function. What is therefore made clear is that the authority has to subserve and boost or further the object and purpose of the Act; and cannot put off the assignment/delegation of Rule making duty under the guise of discretion and that too for unreasonable length of time. Prompt action qua the function delegated if not taken, it amounts to abasing as well as erosion of the Constitution and rule of law we have adopted as well as of the democratic values. Whenever there is eroding or abasing act or conduct on the part of the Executive/delegate owing to omission or inertness qua the delegated function, the Court having being the saviour of the Constitution and vested with supervisory power cannot sit on the fence; it has to play its active and efficacious role by issuing appropriate writ, and make the erring or inert authority to function or act in accordance with law & constitutional mandates. It may also be stated that, rules and regulations are to be framed taking assistance of the experts so that the implementation of the Act can be just, efficacious, fair,

systematic, methodical and well-regulated so that the authority may not make a botch of it, or bungle, and has to face no difficulty or problem while the subject may not have to face any hardship or injustice owing to inequal or ill-based approach. Rule making function therefore cannot be put off to an indefinite period under the guise of discretion.

14. The Act was passed in 1984 and was brought into force from 15th August 1989. Till the hearing of this application, the Rules are not framed. By now more than 11 years have rolled by, but the State Government has taken no action to further the object & purpose of the Act and esteem the right acquired by the petitioner & other Ex.MLAs. by framing the Rules u/s. 5. No good cause is assigned for such inaction. By such delayed inertness or omission, the Government has not only marred the right of the MLAs. and made the Act non-est but it has also pooh-poohed the Rule of law, democratic values and the Constitution. To put it differently, by inaction the Executive has bred autocracy leading to injustice and gradually gnawing at and nibbling out the Democratic system and commendable Constitution we have adopted for common good. The abdication of the Rule making function for indefinite time misconstruing the word "may" appearing in Sec. 5, is for the aforesaid reason, required to be curbed & set right issuing appropriate direction. The contention of Mr. A.D. Oza, the Government Pleader does not gain a ground to stand upon.

15. Whether the Government should be directed to give pension to the Ex-MLAs and the petitioner is the next question that arises for consideration. For the reasons stated hereinabove, Section 3 of the Act is not made subject to Section 5 of the Act and framing of Rules. Section 3, being independent, has to be complied with in letter and spirit even if Rules in that regard are not framed. Section 3 provides that a person who has served as a Member for a term of five years whether before or after commencement of the Act is entitled to a pension of Rs. 300/= per month. The person, who has served as a Member for a period of more than 5 years, is entitled to additional pension of Rs. 60/= per month for every year of such services in excess of 5 years but not exceeding Rs. 600/= per month. If the Assembly is dissolved before the expiry of the duration (term) of 5 years, the Member of such Assembly is also entitled to the pension because he will be deemed to have served as a Member for 5 years. While reckoning the period of the number of years, the person who has served for certain period as the Speaker or the Union Minister or the State Minister

or the Deputy Minister or the Parliamentary Secretary has to be considered and such person, i.e. MLA is not entitled to any pension under Section 3 for the period during which he holds the office of the President or Vice-President, Governor or becomes the Member of the Parliament or is employed on salary basis under the Central Government or any State Government or Corporation controlled by the Central or State Government or the local authority, or otherwise receives any remuneration from such Corporation or local authority or Government, but this is subject to his continuing to receive such remuneration. When he ceases to hold any of the aforesaid posts, he is again entitled to the pension. The Rules are to be framed with regard to the Form in which the application is to be made; when the same to be tendered, to whom the same should be tendered, how the same should be sent; what certificates are required to be furnished along with the application; what type of declaration is to be made; what kind of authentication or attestation is necessary; and what should be the other requirements etc, but if the Rules are not framed, it will be open to prefer an application on a blank paper satisfying the requirements of Sections 3 & 4. When accordingly Section 3 provides about the payment of pension to the MLA, it would be unjust and highly improper on the part of the Government if the payment of pension is withheld solely on the ground that the Rules under Section 5 are not framed.

16. In the case on hand, issuing the Notification on 8th August 1989 the Act is brought into force from 15th August 1989. Vide Section 5, Legislature has assigned the function of framing of the Rules to the Executive, and till today though more than 11 years have passed, Rules are not framed. No reason is assigned as to why the Rules are not framed. It seems that under the guise of `no Rules', the Government wants to avoid the payment of pension, defy the mandate of the Legislature and impair the right acquired by the Ex-MLAs. When this is the case and the whole object of the Act is being pooh-poohed amounting to disregard to the mandate of the Legislature, the Court cannot afford to sit in the ivory tower of isolation. In that case, it would be just to give necessary direction to the Government to frame the Rules. On another count also such direction can be given. As stated above, the Executive has to carry out the mandate of the Legislature expressed through the Statutes and Acts and if that mandate is disregarded or ignored, harmony amongst the three organs of the Government would be shattered and that would be nothing but a fall of the democratic system and the rule of law

we have adopted.

17. It is submitted that the Government has to face many odds & difficulties. If the Government is facing difficulties owing to natural calamities like earthquake and the like, and priority on war-footing is required to be given to relief-work & rehabilitation, it must be given breathing time.

18. For the aforesaid reasons, the application deserves to be allowed and appropriate directions are required to be issued. The application is, accordingly, allowed. The opponent is directed to decide the petitioner's application within the period of three months from today keeping Section 3 read with Section 4 of the Act in mind, and shall not abstain from deciding on the ground that the Rules are not framed. The opponent is further directed to frame the Rules under Section 5 of the Act within the period of 10 months from today undergoing required formalities. Rule accordingly made absolute.

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